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IN THE

Supreme Court of the United States

October Term, 1968.

No. 1190.

MILTON BERGER, et al.,

Petitioners,

v.

COMMISSIONER OF INTERNAL REVENUE.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit.

REPLY BRIEF FOR THE PETITIONERS TO THE BRIEF FOR THE RESPONDENT IN OPPOSITION.

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Reply to Respondent's Argument.

Respondent in his argument makes four basic points. Each is either incorrect or unsupported by the Record.

1. He states that the rule has been established that the Commissioner's determinations of taxpayer's last known address will be sustained if based on the facts known to him at the time of mailing, he could reasonably determine that the taxpayers wished to be reached at the address to which the notice was sent.

The record is devoid of any evidence that could support a conclusion that the taxpayers wished to have the notices sent to any address other than the one they explicitly directed in their powers of attorney, see also Petition for Writ of Certiorari, pp. 34, 35 app. Further, the Tax Court, the trier of the facts, made no finding or statement in its opinion to support the respondent's assertion that the Commissioner could reasonably have believed the taxpayers wished to have the notices sent to the addresses to which they were sent.

2. He asserts that the taxpayers' last known address is a question of fact to be decided by the trier of fact on the basis of the entire record.

However, as was noted in the Petition for Writ of Certiorari, pp. 14, 15, the trier of fact made no finding whatsoever as to whether the notices were sent to the respective last known addresses of petitioners. An examination of the Tax Court's Opinion, Petition for Writ of Certiorari, Appendix C, will disclose no such finding was made. Indeed, the Court of Appeals acknowledged no such express finding was made, Petition for Writ of Certiorari, Appendix A, p. 8 app., but it erroneously stated such finding was implied, see Petition for Writ of Certiorari, pp. 14, 15.

3. He states none of the cases mentioned in his brief or cited by petitioners "* * * creates an *immutable* rule of law that a direction given on a *slightly modified* power of attorney form *necessarily* creates a new last known address which must be followed in all instances *regardless of the record evidence.*" (Emphasis supplied.)

The above quoted language sets a high standard for equivocation but when it is stripped of its concealing modifiers it is erroneous.

Petitioners readily concede that no such "immutable" rule of law exists. They assume, however, that the Solicitor General of the United States, who presumably has chosen his language with care, knows full well that there are very few, if indeed there are any, "immutable" rules of law. Indeed, if only an "immutable" rule of law could create a conflict between Circuit Courts of Appeals, then no such conflicts would ever be found to exist.

The reference to a "slightly modified power of attorney form" is both specious and evasive. A slight modification can be as far reaching in effect as an elaborate and extensive one, for example, inserting or striking the word "not" in a contract can reverse the entire meaning thereof, regardless of how slight the modification. The question is not whether the modification is slight or extensive, but rather what was the effect of the modification. It is noted that respondent does not suggest that the modified power of attorney did not effectively direct that notices be sent to petitioners at their attorney's address.

Respondent states such a change does not "necessarily" create a new last known address in all instances "regardless of the record evidence." Are we to conclude that respondent concedes that such a change generally creates a new last known address, as he well might in view of Rev. Proc. 61-18, 1961-2 C. B. 550.

If such a change generally creates a new last known address then what does he refer to when he infers that the "other record evidence" rebuts the conclusion that the power of attorney when filed created a change of last known address? He nowhere enlightens the Court as to what evidence or findings of fact he relies on, and it is respectfully suggested that he could not do so because no such record evidence or findings of fact exists.

Further, if the foregoing quotation by respondent is stripped of its many qualifications it is erroneous. Stripped of the qualifications he, respondent, says no case lays down a rule of law that a power of attorney direction creates a change of address for purposes of mailing a notice of deficiency. However, various of the cases lay down this precise rule.

In *D'Andrea v. Commissioner*, 263 F. 2d 904 (C. A. D. C.) at p. 907, the Court stated:

> "This instrument [the power of attorney] begins with the petitioner's present address [the address on the return] and closes with the clear designation of a new one [the attorney's]. The latter was thereafter the address last known to the Commissioner." [Parenthetical Insertions supplied.]

Further, in the *D'Andrea* case, the Court noted in footnote 6 that the Commissioner had successfully contended in *United States v. Williams,* 164 Fed. Supp. 874 (S. D. Ohio, 1958), aff'd. 264 F. 2d 227 (C. A. 6) that a designation in the power of attorney of the attorney's address for mailing created a new last known address.

Further, although *DeWelles v. Commissioner,* 378 F. 2d 37 (C. A. 9) does not deal with a change of address resulting from a power of attorney it lays down the much broader rule that any notification of a new mailing address is a change of address which must be followed by the Commissioner, see also Petition for Writ of Certiorari, pp. 9, 10.

4. The respondent states at pp. 6, 7 of his brief that it is clear that the Tax Court's determination that the mailings at issue were to petitioners' last known addresses is supported by substantial evidence and is not clearly erroneous and was therefore, properly affirmed by the Court of Appeals.

However, as was heretofore noted in this brief, p. 2, and in the Petition for Writ of Certiorari, pp. 14, 15, the Tax Court made no finding that the mailings were to the last known addresses.

The respondent in his footnote No. 5 suggests that since a copy was sent by ordinary mail to Whitman (the attorney) sufficient notice was given in any event, citing *Boren v. Riddell,* 241 F. 2d 670 (C. A. 9).

Boren v. Riddell, supra, is not authority in the case at bar where the notices sent to the attorney by ordinary mail were copies and not intended to be the notices of deficiency themselves. Indeed, if *Boren v. Riddell* is authority for the proposition cited by respondent, it is in direct conflict with *D'Andrea v. Commissioner, supra,* which explicitly rejected such a contention where it stated at p. 907.

> "Sending a copy of the deficiency notice by ordinary mail to petitioners' attorney in fact fell far short of satisfying the statutory requirement."

In its footnote No. 6, respondent tends to concede that a conflict does exist as to the question of whether a notice not mailed to the last known address is valid. He then cites *Delman v. Commissioner,* 384 F. 2d 929 (C. A. 3), certiorari denied, 390 U. S. 952 for the proposition that resolution of that alternative question would not affect the result of petitioners' case, and is, therefore, not appropriate here.

It must be pointed out that while the aforementioned conclusion was correct under the *Delman* case it is inapposite in the instant case. In *Delman* there was no direction as to mailing which was ignored by the Commissioner. In that case the Commissioner sent the notice to the address shown on the return which was in care of Delman's accountants Goodman, Israelow & Lipton, even though he knew that

Delman had changed his residence in the interim. The power of attorney contained no mailing direction, merely specifying that copies be sent to taxpayer's attorney, Cohen. In that same power of attorney Goodman was named as one of the taxpayer's representatives and Goodman participated actively throughout. It was entirely reasonable to send the notice to Goodman, the address shown on the return, since taxpayer had already indicated by using such address that for Internal Revenue purposes he did not want his residence address used. Certainly, the taxpayer in *Delman* could not assert any direction given by him was ignored.

Under the circumstances, the lower Court's determination in *Delman* that the notice was mailed to the last known address would seem to have considerable merit and certainly would not be the sort of question to be reviewed by the Supreme Court. There is, however, a far different situation in the case at bar where no question exists but that the Commissioner ignored the taxpayers' explicit direction contained in their powers of attorney.

Conclusion.

The Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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